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MICHAEL RODAK, JR., CLERK

# In the Supreme Court of the United States

**October Term, 1973**
**No. 73-2**

FRANK J. KAEHNI and MARIE KAEHNI,
*Petitioners,*

vs.

DIFFRACTION COMPANY,
*Respondent.*

## PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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The Petitioners, Frank J. Kaehni and Marie Kaehni, respectfully pray that the Court reconsider its Order of October 9, 1973, denying their Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit, and grant the Petition.

As grounds for this Petition for Rehearing, the Petitioners respectfully request the Court's consideration of the following:

In the Petition for Writ of Certiorari the Petitioners emphasized the grievous injury done *to them* by the decision below in penalizing them for being held wrong in asserting their rights *as plaintiffs* in a patent infringement action. It was there pointed out that the decision below was contrary to *this country's* public policy, previously expressly recognized by this Court, of not discouraging one

from protecting his property through court action by imposing a disastrous financial burden on any plaintiff if he loses because the trial court disagrees with him.

In this Petition for Rehearing, there is shown the logical consequences which also follow when *a defendant* loses an action, such as a patent infringement action, because the trial court disagrees with the alleged infringer and sustains the patent. Many a small manufacturer threatened by a larger competitor with a patent infringement action, no matter how unfounded the small manufacturer believes the charge to be, but *faced with the precedent of the decision below,* will likely "cave in" and stop manufacturing the accused item or unwillingly take out a royalty-paying license.

With this logical result of threatening *both* patentees attempting to enforce their patent and small manufacturers unjustly charged with infringement, with the awesome risk of having to assume the tremendous burden of paying the opponent's charges for the time of its officers and for all the opponent's legal fees (as done by the decision below), then there is indeed an interference with free enterprise. Unless one is financially able to assume the risk of such a financial burden should the trial court believe one is wrong, then there will be a great obstacle placed in the way of free flow of ideas, in the way of protecting patent rights granted by the United States, and in the way of those who would manufacture items if *otherwise* able and willing to properly defend themselves against unfounded patent suits.

When considered in the light of the natural consequences flowing from the decision below in interfering with commerce, the decision below should not stand. It is contrary to sound public policy under the present standards of this Court in respect to freedom of trade.

## CONCLUSION

By reason of the foregoing, it is respectfully urged that this Petition for Rehearing be granted, and that upon further consideration, a Writ of Certiorari issue to the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

BRUCE B. KROST
and
EDWARD I. STILLMAN
*Attorneys for Petitioners*

## CERTIFICATE OF COUNSEL

I, Bruce B. Krost, counsel for the above named Petitioners, do hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in Rule 58, subdivision 2, of the Rules of this Court.

BRUCE B. KROST